EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY

AT THE TIME OF FILMING. IF AND WHEN A BETTER

COPY CAN BE OBTAINED, A NEW FICHE WILL BE

ISSUED.

(4)

Supreme Court, U.S.
FILED
FEB 19 2003
CLERK

No. 02-8286

IN THE
SUPREME COURT OF THE UNITED STATES

DELMA BANKS, JR.
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

BARRY McBEE
First Assistant Attorney General

JAY KIMBROUGH
Deputy Attorney General
For Criminal Justice

GENA BUNN
Assistant Attorney General
Chief, Capital Litigation Division

*JOHN ANDREW HUTTON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

ATTORNEYS FOR RESPONDENT

* Counsel of Record

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:14 P.04

25 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED WHEN IT REJECTED PETITIONER'S ALLEGATION THAT PROSECUTORS HAD VIOLATED *BRADY v. MARYLAND* BECAUSE (1) THE EVIDENCE PRESENTED IN SUPPORT OF PETITIONER'S CLAIM WAS PROCEDURALLY BARRED FROM BEING CONSIDERED ON FEDERAL COLLATERAL REVIEW, AND (2) PETITIONER'S CLAIM WAS WITHOUT MERIT EVEN IF THE DEFAULTED EVIDENCE COULD BE CONSIDERED BY THE FEDERAL COURTS.

2. WHETHER THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT PETITIONER HAD FAILED TO DEMONSTRATE PREJUDICE STEMMING FROM HIS TRIAL ATTORNEY'S ALLEGEDLY DEFICIENT PERFORMANCE DURING PUNISHMENT PROCEEDINGS.

3. WHETHER THE LOWER COURTS ERRED BY REFUSING TO CONSIDER THE MERITS OF A CLAIM RAISED FOR THE FIRST TIME BEFORE THE FEDERAL DISTRICT COURT IN PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

4. WHETHER THE LOWER COURTS ERRED BY CONCLUDING THAT PETITIONER'S CLAIM UNDER *SWAIN v. ALABAMA* WAS BARRED FROM SUBSTANTIVE FEDERAL REVIEW BY AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL DEFAULT.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:14 P.05

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Facts of the Crime. 1

II. Evidence Admitted During Punishment 3

III. Course of Proceedings and Disposition Below 4

ARGUMENT 6

I. The Questions Presented For Review Are Unworthy Of The Court's Attention 6

II. Certiorari Review Of Banks' *Brady* Claim Is Unwarranted Because The Fifth Circuit Correctly Concluded That The Evidence Presented In Support Of Banks' Allegations Was Procedurally Barred From Being Considered On Federal Collateral Review. Moreover, The Lower Court Properly Found That Banks' Claim Was Without Merit Even If The Defaulted Evidence Could Be Considered By The Federal Courts In The First Instance. 8

A. The Court of Appeals correctly determined that Banks had failed to demonstrate "cause" to excuse both his failure to develop the facts supporting his *Brady* claim during state habeas proceedings, and his failure to exhaust his reliance on evidence first presented during federal collateral review. 9

B. In any event, the Fifth Circuit correctly found that Farr's status as a paid police informant was not "material" within the meaning of *Brady*. 15

1. Farr's testimony was adequately corroborated by other witnesses at trial. 16

TABLE OF CONTENTS, (CONTINUED)

PAGE

2. Given the other evidence offered by the defense to impeach Farr's testimony, any additional impeachment material would have added little to the defense's case. 19

III. Certiorari Review Is Unwarranted On Banks' Sixth Amendment Claim Because The Fifth Circuit Correctly Determined That Banks Had Failed To Demonstrate Prejudice Stemming From His Trial Attorney's Allegedly Deficient Performance During Sentencing Proceedings. 20

IV. Certiorari Review Is Unwarranted On Banks' Claim That The Fifth Circuit Erred When It Concluded That The District Court Did Not Abuse Its Discretion By Declining To Consider A *Brady* Claim That Had Not Been Alleged In Banks' Federal Habeas Petition. 27

V. Certiorari Review Is Unwarranted On Banks' *Swain* Claim Because The Fifth Circuit Correctly Found The Claim To Be Procedurally Defaulted 31

A. The Texas contemporaneous objection rule is firmly established and applied regularly to similar claims. 32

B. Banks failed to demonstrate cause and prejudice. 36

CONCLUSION .....

TABLE OF AUTHORITIES

CASES PAGE

Allen v. Hardy, 478 U.S. 255 (1986) 31

Batson v. Kentucky, 476 U.S. 79 (1986) ..... passim

Bell v. Cone, 122 S. Ct. 1843 (2002) 21

Brady v. Maryland, 373 U.S. 83 (1963) ..... passim

Byrd v. Armontrout, 880 F.2d 1 (8th Cir. 1989) 36

Caldwell v. Mississippi, 472 U.S. 320 (1985) 32

Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978) 35

Coleman v. Thompson, 501 U.S. 722 (1991) 10,32,37

Cunningham v. Estelle, 536 F.2d 82 (5th Cir. 1976) 35

Edwards v. Carpenter, 529 U.S. 446 (2000) 37

Evans v. Cabana, 821 F.2d 1065 (5th Cir. 1987) 39

Ex Parte Bagley, 509 S.W.2d 332 (Tex. Crim. App. 1974) 34

Ex Parte Haliburton, 755 S.W.2d 131 (Tex. Crim. App. 1988) 35

Ford v. Georgia, 498 U.S. 411 (1991) 33

Ford v. State, 507 S.W.2d 735 (Tex. Crim. App. 1974) 38

Giglio v. United States, 405 U.S. 150 (1972) 16

Gray v. Netherland, 518 U.S. 152 (1996) 10,12,13

Grijalva v. State, 614 S.W.2d 420 (Tex. Crim. App. 1980) 35

Hardin v. State, 475 S.W.2d 254 (Tex. Crim. App. 1972) 38

TX DEC ATTY GEN Fax:5208132 Mar 3 2003 10:15 P.08

CASES	PAGE
Harris v. Nelson, 392 U.S. 286 (1969)	30
Harris v. Reed, 489 U.S. 255 (1989)	32
Hathorn v. Lovorn, 457 U.S. 255 (1982)	32,33
Hogue v. Johnson, 131 F.3d 466 (5th Cir. 1997)	34,35
Horne v. Trickey, 895 F.2d 497 (8th Cir. 1990)	38
James v. Kentucky, 466 U.S. 341 (1984)	32
Jason v. State, 589 S.W.2d 447 (Tex. Crim. App. 1979)	38
Johnson v. State, 411 S.W.2d 363 (Tex. Crim. App. 1967)	38
Jones v. Barnes, 463 U.S. 745 (1983)	38
Jones v. Butler, 864 F.2d 348 (5th Cir. 1988)	34
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)	8,9,30
Kyles v. Whitley, 514 U.S. 419 (1995)	15
Lee v. Kemna, 534 U.S. 362 (2002)	32
Lindh v. Murphy, 521 U.S. 320 (1997)	6
Lopez v. State, 437 S.W.2d 268 (Tex. Crim. App. 1968)	34
Mathews v. State, 768 S.W.2d 731 (Tex. Crim. App. 1989)	35
McCleskey v. Zant, 499 U.S. 467 (1991)	passim
McCrory v. Henderson, 82 F.3d 1243 (2nd Cir. 1996)	33

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:16 P.09

CASES	PAGE
Michigan v. Long, 463 U.S. 1032 (1983)	32
Murray v. Carrier, 477 U.S. 478 (1986)	10,13,37
Penry v. Lynaugh, 492 U.S. 302 (1989)	25
Picard v. Connor, 404 U.S. 270 (1971)	9
Reed v. Ross, 468 U.S. 1 (1984)	36
Ridley v. State, 475 S.W.2d 769 (Tex. Crim. App. 1974)	38,39
Rodriguez v. State, 513 S.W.2d 22 (Tex. Crim. App. 1974)	38
Singleton v. State, 346 S.W.2d 328 (Tex. Crim. App. 1961)	34
Slack v. McDaniel, 529 U.S. 473 (2000)	7
Strickland v. Washington, 466 U.S. 688 (1984)	passim
Strickler v. Greene, 527 U.S. 263 (1999)	passim
Swain v. Alabama, 380 U.S. 202 (1965)	passim
Teague v. Lane, 820 F.2d 832 (7th Cir. 1987)	33,34
Trevino v. Texas, 503 U.S. 562 (1992)	33
United States v. Armstrong, 951 F.2d 626 (5th Cir. 1992)	28,29
United States v. Bagley, 473 U.S. 667 (1985)	15
Wainwright v. Sykes, 433 U.S. 72 (1977)	37
Washington v. Davis, 426 U.S. 229 (1976)	39

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:16 P.10

TABLE OF AUTHORITIES, (CONTINUED)

CASES **PAGE**

Williams v. State, 773 S.W.2d 525 (Tex. Crim. App. 1988) 35

(Michael) Williams v. Taylor, 529 U.S. 420 (2000) ..... passim

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 39

Withrow v. Williams, 509 U.S. 680 (1993) 30

Wright v. Hopper, 169 F.3d 695 (11th Cir. 1999) 34

Ylst v. Nunnemaker, 501 U.S.797 (1991) 32

Constitutions, Statutes and Rules

U. S. Const., amend. XIV 33,36

28 U.S.C. § 2242 (West 1995) 29

28 U.S.C. § 2253(c)(2) 7

28 U.S.C. § 2254(b) (West 1995) 8,9

TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon Supp. 2002) 10

SUP. CT. R. 10 6

FED. R. CIV. PROC. 15 29,30

Miscellaneous

Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA") 6,7

Rule 11, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (West 1995) 29

TX OFC ATTY GEN Fax:3206132 Mar 3 2003 10:16 P.11

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Delma Banks, Jr. ("Banks") is scheduled to be executed after 6:00 p.m. (CDT) on Wednesday, March 12, 2003, for the 1980 capital murder of sixteen-year-old Richard Wayne Whitehead. He now seeks certiorari review of the Fifth Circuit Court of Appeals' decision reversing the district court's partial grant of federal habeas corpus relief regarding two sentencing-phase issues and denying a Certificate of Appealability ("COA") on certain additional claims. However, as discussed below, the Court of Appeals applied established federal law and correctly concluded that Banks was not entitled to collateral relief. Banks does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals summarized the evidence presented during the guilt phase of Banks' trial as follows:

> The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash[, Texas,] on the morning of April 15, 1980. The deceased had been shot three times, twice in the head and once in the upper back. One shot had been fired at a maximum distance of eighteen to twenty-four inches. Near the scene several empty beer cans and two spent shell casings were found.
>
> Patricia Hicks testified that she was a friend of the deceased and that she was with the deceased during the evening of April 11, 1980. Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a black vinyl top, and red hood. During the course of the evening the pair were joined by [Banks] and at his suggestion beer was purchased. The three went to the park near Nash and drank beer. [Banks'] residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home.

TX OFC ATTY GEN Fax:3206132 Mar 3 2003 10:16 P.12

Patty Bungardt testified that [Banks] and the deceased visited her at her house around 11:30 p.m. on April 11. They stayed for approximately ten to fifteen minutes.

Mike Fisher testified that he lived about one hundred yards from the park in Nash. At approximately 4:00 a.m. on April 12, he heard two gun shots.

Charles Cook testified that he met [Banks] on the morning of April 12 in Dallas. [Banks] was driving a vehicle which had the same description as the deceased's. Cook and his wife befriended [Banks] and allowed him to stay with them at Cook's grandfather's home. Cook had noticed a sprinkle of blood on [Banks]'s pants and asked [Banks] about it. [Banks] told him that he had shot a white boy. Later that evening [Banks] told Cook that he had killed someone. [Banks] told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. [Banks] decided to kill the person for the hell of it and take his automobile to Dallas. Cook eventually obtained a pistol and the automobile from [Banks]. The pistol was later identified through ballistic testing as the murder weapon. [Banks] later returned to Texarkana by bus. Cook sold the pistol to his neighbor and took the automobile to West Dallas and left it. It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones.

Cook's wife and sister testified that they saw [Banks] driving a green Mustang on April 12. Cook's grandfather stated that [Banks] stayed at his house for a night or two. Cook's neighbor, Jones, also testified that he met [Banks] during the same time. [Banks] told him he had a little misunderstanding with someone and had broken his jaw or "something like that." [Banks] asked Jones "did I want to buy any iron, whatever, to make it back to Texarkana."

After the deceased's body was found [Banks] was placed under surveillance by law enforcement officers. On April 23 or 24 they observed [Banks], Marcus Jefferson, and Robert Farr, drive together from Texarkana to Dallas. [Banks] was driving the vehicle and after a few stops he eventually went to where Cook resided. The officers watched [Banks] leave the automobile, walk to the front door and then return to the automobile carrying an object. Jefferson and Farr testified that when [Banks] returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun.

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:17 P.13

[Banks] did not testify and did not present any evidence.

Banks v. State, 643 S.W.2d 129, 131-32 (Tex. Crim. App. 1982).

II. Evidence Admitted During Punishment

The Fifth Circuit offered the following summary of punishment-phase evidence in its opinion below:

> *At the penalty phase,* the State presented two witnesses: [Robert] Farr and Vetrano Jefferson. Vetrano Jefferson was the brother of Banks' common-law wife and older brother of Marcus Jefferson (who had accompanied Banks and Farr to Dallas eight days after the victim was found).
>
> *Vetrano Jefferson testified* that, one week before the victim's death, Banks struck him (Vetrano Jefferson) with a pistol *and threatened to kill him.*
>
> *Farr testified* he, Banks, and Marcus Jefferson drove to Dallas so that Banks could reclaim his pistol to commit armed robberies and take care of any trouble that might arise during one.
>
> *As part of Banks' evidence,* two witnesses testified in order to discredit Farr: [*James*] *Kelley testified* he recently drove Farr to several doctors' offices to fill false prescriptions; and, *a former Arkansas police officer* [*Gary Owens*] *testified* Farr served as a paid informant in that State and was known to be unreliable.
>
> *Banks' parents and several acquaintances testified* that Banks was a respectful, churchgoing young man.
>
> And, *Banks testified.* Among other things, he stated it was his idea to obtain a gun so that Farr could commit armed robbery. And, he admitted striking Vetrano Jefferson with a gun and threatening to kill him.

See Petitioner's Appendix to Petition for Writ of Certiorari ("Appendix") A at 6-7 (emphasis in original).

III. Course of Proceedings and Disposition Below

In the fall of 1980, Banks was tried, convicted and sentenced to death in a Texas court

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:17 P.14

for murdering Richard Whitehead during the course of a robbery. Tr 109-110.[1] His conviction and sentence were reviewed by the Texas Court of Criminal Appeals, which affirmed in a published opinion on November 3, 1982. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1982). After the state court denied rehearing, *id.*, this Court declined certiorari review on October 11, 1983. *Banks v. Texas*, 464 U.S. 904 (1983).

On December 27, 1983, Banks filed what would be his first of three state habeas corpus applications challenging his conviction and death sentence.[2] *See Ex parte Banks*, No. 13,568-01 at 5. After holding an evidentiary hearing, the state habeas court entered findings of fact and conclusions of law recommending that Banks' application be denied. *Id.* at 13-14. The Court of Criminal Appeals then denied relief in an unpublished order on February 29, 1984. *Id.* at unpublished order of Feb. 29, 1984 (per curiam).

Banks filed his second state habeas application on May 2, 1984. *See Ex parte Banks*, No. 69,302 at 1. The state habeas court held an evidentiary hearing on Banks' claims and again recommended that relief be denied. *Id.* at 14. On September 26, 1984, the Court of Criminal Appeals issued an unpublished order denying Banks' application. *Id.* at unpublished order of Sept. 26, 1984 (per curiam). However, that order was later withdrawn and replaced with a published opinion rejecting Banks' state and federal claims. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989).

On January 13, 1992, Banks filed a third state habeas application raising seventeen

[1] "Tr" refers to the transcript of pleadings and documents filed with the court during Banks' state capital murder trial, followed by page numbers. "SR" refers to the transcribed record of trial proceedings, preceded by volume number and followed by page numbers.

[2] In 1993, Banks filed a fourth state writ application. However, that application did not raise a substantive challenge to Banks' conviction or death sentence, but rather asked the Court of Criminal Appeals to stay an evidentiary hearing scheduled to be held in conjunction with his third state habeas application. *See Ex parte Banks*, 13,568-04 (Tex. Crim. App. Mar. 22, 1993).

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:18 P.15

claims for relief. 1 SHTr 76-222.[3] However, he later added additional allegations in two supplemental petitions filed in April and September of 1992. 2 SHTr 173-79; 3 SHTr 1-18. The state habeas court recommended that relief be denied on each of Banks' contentions, 5 SHTr 167-73, but the Court of Criminal Appeals remanded the case and ordered that the lower court hold an evidentiary hearing to resolve Banks' complaint that African American citizens had been systematically excluded from jury service in violation of *Swain v. Alabama*, 380 U.S. 202 (1965). 1st Supp. SHTr 6-7. On July 22, 1993, after holding a four day evidentiary hearing, the habeas court issued findings of fact and conclusions of law recommending that relief be denied. 2d Supp. SHTr 25-33. The Court of Criminal Appeals then denied relief in an unpublished order based on the trial court's findings and conclusions. *Ex parte Banks*, No. 13,568-03 (Tex. Crim. App. Jan. 10, 1996) (per curiam).

Following the denial of his state court appeals, Banks filed a federal habeas petition on March 7, 1996. *See* 1 R 1-63.[4] After holding an evidentiary hearing on Banks' claims, the federal magistrate judge recommended conditionally granting the writ based on her conclusions that (1) the prosecution improperly failed to disclose that a punishment phase witness had been a paid police informant, and (2) Banks' trial attorney had rendered ineffective assistance of counsel during punishment proceedings. *See* Appendix C at 21-25, 40-44, 54. On August 18, 2000, the district court adopted the magistrate's report with minor modifications and conditionally granted Banks relief from his death sentence. Appendix B

[3] "SHTr" refers to the transcript of pleadings and documents filed with the state court during proceedings on Banks' third state habeas application, proceeded by volume or supplemental transcript number and followed by page numbers. "SHR" refers to the evidentiary hearing held in conjunction with Banks' habeas application, preceded by volume number and followed by page numbers.

[4] "R" refers to the federal record on appeal, preceded by volume number and followed by page numbers.

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:18 P.16

at 1-7. However, the court denied relief with respect to Banks' underlying capital murder conviction. *Id.* Banks later filed a motion to amend the judgment and a request for a COA on certain guilt-innocence issues, but each was denied by the district court. *See* 5 R 1209-17, 1231-49, 1263-66.

The Director subsequently appealed the district court's decision regarding Banks' sentence, and Banks cross-appealed seeking relief from his conviction. The United States Court of Appeals for the Fifth Circuit then reversed the lower court, rendered judgment in favor of the Director, and denied Banks a COA on his additional claims. *See* Appendix A. After the appellate court also denied Banks' motion for rehearing, he filed a timely petition for writ of certiorari with this Court on December 23, 2002.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Banks fails to advance a "compelling reason" for this Court to review his case, and none exists. Indeed, the opinion below involved a unanimous, unpublished decision by the Fifth Circuit panel, in which the appellate court merely applied established procedural and constitutional principles. *See* Appendix A. Accordingly, the petition presents no important question of federal law to justify the exercise of this Court's certiorari jurisdiction.

Moreover, because Banks filed his federal habeas petition in the district court on March 7, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") were not applicable to reviewing his federal claims. *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997) (amended provisions do not apply to habeas cases pending on April 24,

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:19 P.17

1996, the effective date of the AEDPA). Instead, this case involves the standard of review that existed prior to the enactment of the AEDPA. As discussed below, the Court of Appeals properly applied a *de novo* review to the issues of law that served as the basis for the district court's partial grant of federal habeas relief and correctly found that the district court had erred in its application of law. The Fifth Circuit therefore properly reversed and rendered judgment in favor of the Director.

Finally, both the district court and the Court of Appeals correctly refused to issue Banks a COA on his claims that were denied by the district court. In particular, as a prerequisite to appellate review, Banks was required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal citations and quotation marks omitted). With regard to those claims wherein the district court denied relief on the merits, Banks was required to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* For claims denied on procedural grounds, Banks had to show that "jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis added). Because Banks did not meet these standards with regard to any of the claims denied by the district court, the courts below properly denied a COA. Consequently, certiorari review is not warranted in the instant case.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:19 P.18

II. Certiorari Review Of Banks' *Brady* Claim Is Unwarranted Because The Fifth Circuit Correctly Concluded That The Evidence Presented In Support Of Banks' Allegations Was Procedurally Barred From Being Considered On Federal Collateral Review. Moreover, The Lower Court Properly Found That Banks' Claim Was Without Merit Even If The Defaulted Evidence Could Be Considered By The Federal Courts In The First Instance.

In his first question presented for review, Banks complains that prosecutors violated this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that punishment-phase witness Robert Farr had been paid $200 to assist police in recovering Banks' handgun. *See* Petition at 24-29. He asserts that Farr's status as a paid police informant amounted to material impeachment evidence that, if provided to the defense, would likely have changed the outcome of his sentencing trial. *Id.* at 28-29. However, the Fifth Circuit correctly determined that Banks was not entitled to federal habeas corpus relief on this basis for three reasons. First, Banks neglected to develop any of the facts supporting his *Brady* claim during state habeas proceedings and failed to demonstrate sufficient cause to excuse his lack of diligence in state court pursuant to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See* Appendix A at 16-20. Second, assuming that Banks was entitled to a federal evidentiary hearing to develop his claim, the evidence the district court used to grant relief was unexhausted under 28 U.S.C. § 2254(b). *Id.* at 20-23. Again, Banks failed to prove cause and prejudice to excuse his failure to exhaust. *Id.* Finally, even if the unexhausted and defaulted evidence could be considered by the federal court in the first instance, it was not sufficient to demonstrate a reasonable probability that the result of Banks' sentencing trial would have been different if Farr's status had been disclosed. *Id.* at 26-33.

In the instant petition, Banks attacks the panel's decision with regard to both the procedural issues and the merits of his claim. Petition at 24-28. However, as discussed below, the Court of Appeals was correct in both respects and properly concluded that relief

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:19 P.19

was unwarranted.

A. The Court of Appeals correctly determined that Banks had failed to demonstrate "cause" to excuse both his failure to develop the facts supporting his *Brady* claim during state habeas proceedings, and his failure to exhaust his reliance on evidence first presented during federal collateral review.

Banks does not dispute that his *Brady* claim is procedurally defaulted due to his failure to develop his allegations in the Texas courts, but instead asserts that the default must be excused based on the circumstances presented in his case. In *Keeney v. Tamayo-Reyes*, this Court held that the cause-and-prejudice standard is the appropriate measure for excusing a habeas petitioner's failure to develop material facts in state-court proceedings.[5] *See* 504 U.S. at 11. The Court also noted that such a rule is consistent with the federal exhaustion requirement:

> Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Id. at 10 (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)); *see also* 28 U.S.C. § 2254(b) (West 1995) (stating that federal court shall not grant a petition for writ of habeas corpus unless state prisoner "has exhausted the remedies available in the courts of the State"). Thus, under *Keeney*, Banks was only entitled to a federal evidentiary hearing to develop facts supporting his *Brady* claim if he could show cause for his failure to develop the facts in state-

---

[5] The *Keeney* Court also announced a "narrow exception" to the cause-and-prejudice requirement where a habeas petitioner "can show that a fundamental miscarriage of justice would result from a failure to hold a federal evidentiary hearing." *Keeney*, 504 U.S. at 11-12 (citations omitted). However, Banks does not seek to take advantage of this exception in the instant petition.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:20 P.20

court proceedings and actual prejudice resulting from that failure.[6] *Id.* at 11. Similarly, under the rules of exhaustion and state procedural default,[7] Banks could not rely on material evidentiary support for his claim that was not presented in state-court proceedings unless he could meet the cause-and-prejudice requirements. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Keeney*, 504 U.S. at 10 ("Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful").

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply" with the relevant procedural requirements. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) ("For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim") (citations omitted). In this case, Banks argues that he was prevented from

---

[6] This Court has analogized the *Keeney* "cause-and-prejudice" standard to the AEDPA's "diligence" standard for obtaining further factual development under 28 U.S.C. § 2254(e)(2). *See* (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 432-34 (2000) (holding that the "failure to develop" language of section 2254(e)(2), which generally precludes further factual development of a partially or wholly unexhausted claim in federal court, is a codification of *Keeney*'s cause-and-prejudice standard).

[7] Banks is procedurally barred from returning to state court to exhaust his factual allegations under Article 11.071, section 5(a), of the Texas Code of Criminal Procedure. That provision generally precludes a prisoner from litigating claims in a successive habeas application that could have been raised in previous applications. *See* TEX. CRIM. PROC. CODE ANN. art. 11.071 § 5(a) (Vernon Supp. 2002). It is well established that if a petitioner fails to exhaust state remedies and the court to which he would be required to return to meet the exhaustion requirement would now find the claim procedurally barred, then the claim is considered defaulted for the purposes of federal habeas corpus review unless the petitioner can either meet the cause-and-prejudice requirements or demonstrate a fundamental miscarriage of justice. *Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:20 P.21

developing his claim during state-court proceedings because trial prosecutors (1) did not convey Farr's informant status to Banks' trial attorney despite their representation in a pretrial letter that they would voluntarily disclose any discoverable material without the need for extraneous litigation, and (2) failed to correct Farr's trial testimony when he suggested that he was not a police informant. Petition at 26-27. Relying on this Court's opinion in *Strickler v. Greene*, 527 U.S. 263 (1999), Banks contends that the concealment of Farr's status at his trial demonstrates "cause" to excuse his failure to present evidence supporting his *Brady* claim during state collateral review.[8] *See* Petition at 25-28. He argues that "if it was reasonable for trial counsel to . . . conclude [that Farr was not an informant], it was equally reasonable for habeas counsel to conclude similarly, as neither counsel nor Mr. Banks had any reasonable way to determine otherwise." *Id.* (footnote omitted).

However, Banks' argument neglects to note that his habeas attorney *alleged during state post-conviction proceedings that prosecutors had suppressed Farr's informant status*. Specifically, the record reveals that Banks asserted the following *Brady* claim in his third application for state habeas relief:

> Further, upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence as required by Brady v. Maryland, 363 U.S. 83 (1963). This evidence included . . . information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." . . . [T]he prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

---

[8] It should be noted that the focus of Banks' argument regarding cause has shifted significantly from that presented to the Court of Appeals. There, Banks tended to concentrate on his purported attempts to develop his complaint in the state habeas court, as well as on certain external impediments that allegedly prevented him from successfully litigating the claim in that forum. However, in the instant petition, Banks focuses almost exclusively on prosecutors' failure to disclose Farr's status *during trial proceedings* as cause for excusing his default. Aside from a short discussion in footnote 12 of his petition, Banks provides no mention of his efforts (or lack of effort) to develop his *Brady* claim on state collateral review.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:21 P.22

1 SHTr 137 at ¶ 114. Thus, unlike the circumstances presented in *Strickler*, Banks was clearly aware of the factual basis for his claim during state-court proceedings but then neglected to develop his allegations in any respect. *Compare Strickler*, 527 U.S. at 276-78, 282-89 (noting that petitioner did not become aware of factual basis for his *Brady* claim until federal habeas proceedings due to prosecution's incorrect representations in state court that all evidence had been disclosed pursuant to an "open file" policy, and concluding that prosecutor's actions were sufficient to demonstrate cause). Despite his belief that Farr was an informant, Banks did not seek discovery in state court or request investigative assistance to develop his allegation.[9] Indeed, even when Banks was granted an evidentiary hearing – a hearing at which both the trial prosecutor and Banks' defense counsel testified – he did not attempt to question or call witnesses to substantiate his *Brady* claim.[10]

Given these circumstances, Banks' case must be governed, not by *Strickler*, but by this Court's opinions in cases such as *Gray v. Netherland*, *supra*, and *McCleskey v. Zant*, *supra*. *See also Strickler*, 527 U.S. at 288 n.33 (declining to "reach, because it was not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of

---

[9] In the Fifth Circuit, Banks asserted that he was prevented from exploring Farr's status in the Texas courts because the state habeas court never acted on his request for investigative assistance in the matter. However, as noted by the Fifth Circuit, the state court record reveals that Banks *never asked* for any assistance with regard to developing his allegations about Robert Farr. *See* Appendix A at 18-19. Instead, his requests in state court were limited to helping him develop a separate *Brady* claim regarding the testimony of Charles Cook. *Id.*; *see also* 4 SHTr 1-2.

[10] The evidentiary hearing ordered by the Court of Criminal Appeals was principally designed to provide Banks with an opportunity to present evidence regarding his *Swain* claim. 1st Supp. SHTr 8-10. Nevertheless, the trial court was also directed to "enter any further findings of fact. . . which it deems relevant to the disposition of this cause." *Id.* In spite of this order authorizing a broader inquiry, Banks never sought to present evidence regarding his *Brady* claim. Concomitantly, there is no evidence that the Texas courts prevented Banks from exploring issues surrounding Farr's status or from presenting evidence supporting his allegations.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:21 P.23

the documents in question and knew, or should have known, how to obtain them"). In both of those cases, the petitioner was previously aware of the factual basis for his claim but failed to raise it in a proper procedural manner. *See Gray*, 518 U.S. at 161 (failure to raise claim in state court); *McCleskey*, 499 U.S. at 498-99 (failure to raise claim in initial federal habeas petition). In both instances, this Court found that the claim was defaulted when raised on federal collateral review. *Gray*, 518 U.S. at 161; *McCleskey*, 499 U.S. at 497-503. It stands to reason that where a state habeas petitioner is aware of the factual basis for a *Brady* claim, and by reasonable means could have obtained evidence to support that claim, he must conduct "a reasonable and diligent investigation" at that time. *See McCleskey*, 499 U.S. at 498. In the instant case, Banks chose not to present any evidence to support his *Brady* claim in state court despite his knowledge of Farr's informant status, and instead waited until federal court litigation to present the written declarations of Robert Farr and the testimony of Deputy Willie Huff, who then confirmed Farr's status. In the absence of "'a showing of some external impediment *preventing* counsel from constructing or raising the claim'" during state post-conviction review, *id.* at 497 (emphasis in original) (quoting *Murray*, 477 U.S. at 492), Banks cannot show cause for defaulting his complaint.

Although Banks may be correct to assert that the events surrounding discovery at a criminal trial are "highly relevant" in resolving whether state habeas counsel was diligent in pursuing a *Brady* claim, *see* Petition at 26, it is not the only inquiry. In this case, regardless of what Banks' trial attorney knew, it does not excuse his habeas counsel from failing to conduct a "reasonable and diligent investigation" once he became aware of Farr's status. In other words, the prosecution's purported failure to disclose evidence *during trial proceedings* does not establish cause here because – in light of Banks' knowledge that Farr was a police informant at the time he filed his third state writ – any initial concealment would not have

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:22 P.24

prevented him from fully litigating the claim during the state post-conviction proceeding. *Cf. McCleskey*, 499 U.S. at 502. For this reason, Banks' reliance on *Strickler* to attack the Fifth Circuit's decision is seriously misplaced. The Court of Appeals properly focused its inquiry on state habeas counsel's efforts to develop his *Brady* claim during the state litigation. There is no evidence that Banks' failure to develop the material facts of his claim at that time was the result of any "objective factor external to the defense [that] impeded counsel's efforts to comply" with the procedural rules.[11] Thus, the lower court correctly concluded that Banks had not demonstrated adequate cause to excuse both his failure to exhaust the material evidentiary support he presented to the federal magistrate judge and his

---

[11] In footnote 12 of his petition, Banks briefly attempts to justify his lack of factual development during the state-court proceeding. For instance, he suggests that he "had no luck in finding Farr until six months after [his federal habeas] petition was filed." Petition at 27 n.12. He thereby implies that he actually made an effort to locate Farr prior to the federal litigation, obliquely suggesting that the crucial evidence was simply unavailable. However, it must be emphasized that Banks has never detailed *any* attempt to find Farr at the time of the state habeas proceeding despite ample opportunity in both the federal district court and the Court of Appeals. Because of this utter lack of evidence to support any kind of earlier investigation, the Fifth Circuit correctly found no such effort by Banks' attorneys. *See* Appendix A at 19 ("As for witnesses not coming forward until after the state court evidentiary hearing, Banks has not demonstrated that he attempted, even if unsuccessfully, to explore this issue, or any other issue, with those witnesses"). Indeed, by suggesting that the Fifth Circuit had "no support" for this finding, *see* Petition at 27 n.12, Banks seems to forget that it was *his burden* to demonstrate cause to excuse the procedural bar.

Banks also invokes Farr's May 1999 declaration filed with the federal court in which Farr proclaimed that he would not have spoken with Banks' attorneys prior to the fall of 1996. Petition at 27 n.12. However, as the Fifth Circuit observed, "[e]ven accepting Farr's statement as true, it does not justify Banks' not attempting to speak to Farr prior to the conclusion of the (three) State habeas proceedings." Appendix at 19. In other words, Banks cannot show diligence by simply suggesting that any investigatory effort would have been useless.

Finally, Banks complains that "Deputy Huff did not volunteer any information about Robert Farr," and did not reveal Farr's status until compelled to do so by the federal court. Petition at 27 n.12. However, this again misses the point. Banks never attempted to interview Huff– or any other investigating officer – during the state proceedings in an attempt to disclose Farr's status. Similarly, unlike his effort in federal court, he never sought to compel Huff's testimony during state post-conviction review. Thus, whatever reluctance Huff had to testify, it does not demonstrate that Banks diligently sought to investigate his claim in the Texas courts.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:22 P.25

failure to develop the factual basis of his *Brady* claim in the Texas courts.[12]

B. In any event, the Fifth Circuit correctly found that Farr's status as a paid police informant was not "material" within the meaning of *Brady*.

Even if Banks could establish cause to excuse the procedural default, his claim fails on its merits. It is, of course, well established that a prosecutor must disclose evidence to a criminal defendant if that evidence is favorable to the defendant and material to the defendant's guilt or punishment. *Strickler*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995); *United States v. Bagley*, 473 U.S. 667, 674-75 (1985); *Brady*, 373 U.S. at 87. Both impeachment evidence and exculpatory evidence fall within this general rule. *Bagley*, 473 U.S. at 676. To establish a constitutional violation based on a failure to disclose evidence, a habeas petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. *Strickler*, 527 U.S. at 281-82. This Court has explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Strickler*, 527 U.S. at 291 (emphasizing that petitioner must show a "reasonable *probability*," rather than a "reasonable *possibility*," of a different result in order to obtain relief under *Brady*) (emphasis in original); *Kyles*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict of confidence").

---

[12] Additionally, as demonstrated in the following subsection discussing the "materiality" of Farr's status, Banks has failed to demonstrate "prejudice" sufficient to overcome any procedural default. *See Strickler*, 527 U.S. at 282 (stating that, unless non-disclosed materials "were 'material' for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default").

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:23 P.26

The Fifth Circuit properly applied this "materiality" standard and determined that, even if Farr's informant status had been improperly concealed from the defense, the undisclosed evidence was not of such a character as to undermine confidence in the outcome of Banks' sentencing proceeding.[13] Appendix A at 26-33. The lower court correctly noted that Farr's testimony was adequately corroborated by other witnesses at trial, including by Banks himself. Additionally, the evidence had only minimal impeachment value in the context of the trial. The court therefore properly found that Banks' *Brady* claim was without merit.

1. Farr's testimony was adequately corroborated by other witnesses at trial.

During both guilt-innocence and punishment proceedings, Robert Farr testified that in late April 1980, he, Banks, and Marcus Jefferson traveled to the Dallas home of Charles "Two-two" Cook to retrieve Banks' pistol. 9 SR 2267-68; 10 SR 2499-500. Farr recalled that when they reached the house, Banks walked up to the porch and spoke to Cook for several minutes while he and Jefferson waited in the car. 9 SR 2268-69; 10 SR 2499-500. Banks then returned to the car and explained that Cook no longer had his gun and that Cook had instead provided him with a different pistol. 9 SR 2269; 10 SR 2500.

During the punishment phase of trial, Farr added additional context to this encounter that was relevant to Banks' future dangerousness. When asked about what they had intended to do with the gun, Farr answered, "I don't know. We were going to pull some robberies on

[13] Banks suggests that the Fifth Circuit's materiality analysis was contrary to this Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972). *See* Petition at 29. However, as noted by the Court of Appeals, *Giglio* involves a distinct constitutional claim from *Brady* and utilizes a different standard for assessing materiality. *See* Appendix at 29-30. The lower court properly distinguished between the two cases, noted that Banks had not raised a *Giglio* claim in either his state or federal habeas petitions, and applied the proper *Brady* standard in its opinion. *Id.* at 29-33.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:23 P.27

the way back [to Texarkana]." 10 SR 2502. He also added that Banks asked him whether the gun Cook had given him would "do," explaining that Banks asked this question because "the gun that we went after, it was a small type of gun and we needed a small type of gun" in order to conceal it. *Id.* at 2500-01. Finally, when asked whether he had inquired of Banks what would happen if there was any trouble "during those burglaries," Farr responded that "[Banks] said he would take care of it." *Id.* at 2503.

The details of this event were largely corroborated by the testimony of several other witnesses. For instance, Marcus Jefferson testified during the guilt phase of trial that he had driven to Dallas with Banks and Farr. 9 SR 2256-57. He recalled that when they got to Dallas, the three of them "just rode around. . . looking for a house." *Id.* at 2257. Jefferson stated that once they located the house, Banks walked up to the porch while he and Farr waited in the car. *Id.* at 2257-58. When Banks returned about five minutes later, he told them that "this Two-two dude gave him another gun. He didn't have [Banks' gun]. . . [Banks] said that Two-two said that some girl had [Banks'] gun, and so Two-two gave him another gun." *Id.* at 2264-65.

Charles "Two-two" Cook also provided testimony during the guilt phase of trial recalling Banks' attempts to retrieve the handgun. Cook stated that while Banks was staying at his house, Cook had taken Banks' gun and sold it to his neighbor. 9 SR 2299-2300, 2304-05. Cook testified that, later that week, Banks called him and asked if "I got rid of the car and where was that pistol, and I told him that I got rid of it." *Id.* at 2308. Banks called again early one morning and told him that he was not far from Cook's house and that he needed to come and talk to him. *Id.* at 2308-09. When Banks arrived, he told Cook that "he needed a pistol and he asked . . . where was his pistol." *Id.* at 2309.

Finally, Banks himself corroborated much of Farr's testimony when he took the stand

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:24 P.28

during punishment proceedings. In his testimony, Banks recalled that Farr planned to commit "some robberies." 10 SR 2567. Although Banks claimed that he had not planned to personally participate in the robbery, he acknowledged that it was his "idea to go get the gun. . . . [s]o [Farr] could pull one." *Id.* at 2568; *see also id.* at 2571-73. Under cross-examination, Banks admitted that, in supplying the gun, he was "going to supply [Farr] the means and possible death weapon in an armed robbery case." *Id.* at 2573.

Thus, the record evidence strongly corroborates Farr's testimony regarding Banks' attempts to recover the handgun. Although Farr's testimony was certainly relevant to Banks' potential for future violence, any attempt by the defense to demonstrate that Farr was acting at the behest of police would have done little to undercut the State's case. *Cf. Strickler*, 527 U.S. at 294 (noting that record provided "strong support" for conclusion that petitioner would have been convicted of capital murder and sentenced to death even if identified witness had been severely impeached with *Brady* evidence). Specifically, even if the jury had known that Farr's story about committing robberies was a ruse to recover the weapon, Banks did not know that the robberies would not occur. Rather, he was under the impression that he was assisting Farr in securing the means to commit a violent crime, and his own testimony reveals that he was fully willing to do so. Consequently, the identified impeachment evidence was simply not of such a character as to "put the whole case in such a different light as to undermine confidence in the verdict."[14] *Kyles*, 514 U.S. at 435 (footnote omitted).

---

[14] It warrants mentioning that, contrary to Banks' argument, Farr's testimony was not the "heart and soul of the state's case for the death penalty." *See* Petition at 28. Obviously, the most compelling evidence of future dangerousness was that Banks had brutally murdered Richard Whitehead in order to steal his car. The State also presented the testimony of Vetrano Jefferson that, only days before Whitehead's murder, Banks had pistol-whipped Jefferson and threatened to kill him. This evidence, combined with Farr's testimony, made up the State's case that Banks posed a continuing risk of future violence.

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:24 P.29

2. Given the other evidence offered by the defense to impeach Farr's testimony, any additional impeachment material would have added little to the defense's case.

Moreover, the impeachment material identified in Banks' petition would have had little value in the context of his trial given the substantial material already offered by the defense to impeach Farr's credibility. In particular, during cross-examination by the defense at the punishment phase of trial, Farr denied (1) informing Officer Huff that he, Banks, and Jefferson were leaving for Dallas, 10 SR 2503-04; (2) going to Arkansas the previous week to obtain false prescriptions and getting into an altercation with a doctor who had refused to provide him with one, *id.* at 2504; (3) being a "snitch" for Arkansas narcotics officer Gary Owens, *id.* at 2509; and (4) that his wife had shot him. *Id.* at 2509-10.

However, during the sentencing trial, the defense presented the testimony of James Kelly, who contradicted Farr's account of events involving the Arkansas physician. Kelly testified that Farr had hired him to take him to Arkansas to get a prescription filled, and recalled that when they reached the hospital, Farr began "fussing" with a doctor over filling the prescription. 10 SR 2547-48. According to Kelly, the doctor then ordered Farr "to get his ass out of there." *Id.* Kelly also testified that, after Farr unsuccessfully attempted to obtain prescription drugs from several other hospitals in Arkansas, he indicated that he was determined to get the drugs before he returned to Texarkana. *Id.* at 2548-51.

Arkansas police officer Gary Owen also disputed portions of Farr's testimony. He indicated that he had known Farr from his duties and described Farr as a "doper." 10 SR 2557. He also opined that Farr was not a truthful person and that he was unworthy of belief. *Id.* at 2558. Owen indicated that he had used Farr as an informant on two or three occasions, but that Farr's information proved to be incorrect and he no longer used Farr. *Id.* at 2558-59.

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:25 P.30

Also, during cross-examination by the defense at the guilt phase of trial, Farr admitted that he had been abusing the drug Dilaudid for seven years and that he had "track marks" on his arm as a result. 9 SR 2270-71. He also acknowledged that he had abused heroin, although he claimed that he stopped once he found a sufficient supply of Dilaudid. *Id.* at 2271. Finally, Farr admitted to smoking marijuana. *Id.* at 2274.

The Fifth Circuit correctly observed that the defense had successfully impeached Farr's credibility with this evidence. Indeed, to the extent that Farr's informant status had any additional impeachment value, it only contradicted Farr's testimony that he hadn't assisted Deputy Huff in his investigation. Such evidence would have been largely cumulative of the other impeachment evidence offered and would have added little to counsel's argument or examination. The lower court therefore was correct in its assessment that "Farr's paid informant status, when considered against the other impeachment evidence about him, and the fact that much of his testimony concerning the trip to Dallas to retrieve Banks' pistol was corroborated, does *not* present a reasonable probability that the jury would have found differently concerning Banks' future dangerousness." Appendix A at 33 (emphasis in original, citation omitted).

III. Certiorari Review Is Unwarranted On Banks' Sixth Amendment Claim Because The Fifth Circuit Correctly Determined That Banks Had Failed To Demonstrate Prejudice Stemming From His Trial Attorney's Allegedly Deficient Performance During Sentencing Proceedings.

In his second ground for review, Banks maintains that his trial attorney rendered ineffective assistance of counsel during punishment proceedings by failing to present mitigating evidence that Banks had suffered from a dysfunctional childhood and from certain psychological disorders. *See* Petition at 11-19, 30-33. The Court of Appeals rejected this allegation, finding that the evidence presented in support of Banks' claim – to the extent that

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:25 P.31

it had been adequately exhausted during state-court proceedings – did not demonstrate a reasonable probability of a different sentencing verdict.[15] Appendix A at 36-40. In the instant petition, Banks faults the panel's decision for two reasons. First, he argues that the Court of Appeals failed to consider the cumulative effect of the omitted mitigating evidence when it conducted its prejudice analysis. Petition at 31-32. Second, he argues that "the mitigating evidence in this record is very similar in quantity and character" to that considered in (*Terry*) *Williams v. Taylor*, 529 U.S. 362 (2000), and that the Fifth Circuit erred by failing to heed this precedent. Petition at 31-33. However, as discussed below, each of these complaints is without merit and the lower court correctly concluded that habeas relief was unwarranted. Certiorari review should therefore be denied.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner bears the burden of satisfying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 688, 687 (1984). *See Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002); (*Terry*) *Williams*, 529 U.S. at 390. Specifically, *Strickland* requires him to show both (1) that counsel rendered deficient performance, and (2) that counsel's actions resulted in actual prejudice. *Strickland*, 466 U.S. at 687. To establish deficient performance, the petitioner must demonstrate that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation

---

[15] In its order granting habeas relief, the district court had relied extensively on the federal hearing testimony of psychologist Dr. Mark Cunningham in concluding that trial counsel's performance had prejudiced Banks' defense. *See* Appendix C at 22-23. However, the Fifth Circuit correctly concluded that Dr. Cunningham's testimony was unexhausted and therefore could not be considered by the federal courts in the first instance. *See* Appendix A at 36-38. In particular, Dr. Cunningham's testimony constituted a "significant expansion of facts and opinions" from the psychological evidence Banks originally presented to the Texas courts. *Id.* at 38. Banks does not challenge this ruling in his certiorari petition. *See* Petition at 30-33. However, in his discussion of how the claim was raised below, he erroneously commingles both exhausted and unexhausted evidence in an apparent attempt to magnify the strength of his prejudice claim. *Id.* at 15.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:25 P.32

fell below an objective standard of reasonableness." *Id.* at 688-90. Second, even if counsel's representation was deficient, the petitioner must also affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 687. This "prejudice" prong requires the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As noted above, Banks' current complaint is limited to counsel's failure to present mitigating evidence regarding his troubled family history and his psychological profile. *See* Petition at 30-33. The available evidence supporting this claim was presented exclusively through the testimony of Banks' mother and father, and through the affidavits filed with the state courts by psychologist Dr. Gregorio Pina. However, as the Fifth Circuit found, this evidence did not amount to the kind of information that would have altered the jury's sentencing decision.

Of the evidence presented to the state courts, there is little to suggest that Banks suffered from any kind of sustained abuse during childhood.[16] During state habeas proceedings, Banks' mother reported that her husband "would get drunk and he would get angry and holler at me." 2 SHTr 7. However, not a single reference to physical abuse appears in her affidavit. Similarly, in Banks' father's affidavit, he mentioned only one instance of "harsh discipline" involving an episode where he tied Banks to a tree and "whipped him with a leather belt or strap" to discipline him for bullying other elementary

[16] As the Fifth Circuit noted, the only evidence of any kind of sustained abuse came from Dr. Cunningham's unexhausted testimony at the federal evidentiary hearing. *See* Appendix A at 36-38.

TX DFC ATTY GEN Fax:3208132 Mar 3 2003 10:26 P.33

school students and stealing their lunch money. 2 SHTr 14.

Also, Banks' parents' testimony at the federal evidentiary hearing added little to their previously-filed affidavits. Banks' father testified that in his "younger days" he had suffered from a drinking problem. 6 R 218-19. Although he admitted that he "used to get drunk every weekend," the elder Banks still maintained that his son was "a good boy," and that he had "raised him real nice." 6 R 217-18. Additionally, Banks' mother testified that Banks suffered from eczema since he was a baby, and that as a result he developed an "inferior complex." 6 R 227-29. She also confirmed that her husband had a drinking problem when Banks was growing up. 6 R 229. However, again, neither witness mentioned any instances of physical abuse or spousal cruelty at any point in their testimony. They also provided no detail about the effects that the elder Banks' "alcoholism" might have had on the family.[17]

Dr. Pina also provided scant evidence about any history of abuse in either of the two affidavits he filed with the Texas courts. Indeed, in his first affidavit, Pina made no mention of abuse of any kind. 2 SHTr 122-26. In an amended affidavit filed with the Court of Criminal Appeals, Dr. Pina asserted that Banks had been "beaten and traumatized by his alcoholic father," but then did not mention any specific incidents of abuse other than the tree-tying episode cited in the affidavit from Banks' father. *See* Amended Affidavit of Gregorio Pina, Ph.D. at 4. Instead, Dr. Pina concluded that Banks suffered the bulk of his childhood

[17] In fact, an examination of the trial record reveals that the testimony of Banks' mother and father differed little from that presented to the jury at trial. There, Banks' father testified during punishment proceedings that Banks was a "nice son" and begged the jury to spare his life because "he will do nobody no harm." 10 SR 2516. Similarly, Banks' mother stated that Banks was a "good boy," and that if the jury spared his life, he would be a good member of the community. 10 SR 2575-76. Thus, the record is clear that even federal habeas counsel could not coax any evidence from Banks' parents that was significantly more scandalous or lascivious than that which was presented to Banks' sentencing jury.

TX DFC ATTY GEN Fax:320813 Mar 3 2003 10:26 P.34

trauma as the result of a "severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin." *Id.* Pina opined that this skin condition caused Banks "to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore," leading to impaired bonding with family and friends and to low self-esteem. *Id.* Additionally, Dr. Pina found that Banks had a "limited cognitive capacity and psychological impairment." *Id.* at 2. For instance, he noted that Banks full-scale IQ was measured between 81 and 85 on the Weschler Adult Intelligence Scale - Revised, and at 73 on the "Stanford-Binet IQ test." *Id.* 2-3. He also stated that his testing revealed "a mild and diffuse neurological impairment and a learning and language disability." *Id.* at 3. Finally, at the time Dr. Pina tested Banks on death row in 1993, he diagnosed him with "moderate to severe depression. . . complicated by feelings of extremely low self-esteem and an almost complete lack of self-worth." *Id.*

However, as the Fifth Circuit concluded, none of this evidence suggests a reasonable probability that the jury would have answered the sentencing phase issues in a different manner if they had been aware of these circumstances at Banks' trial.[18] At best, the omitted

[18] Banks' sentencing jury was asked to answer the following three special issues:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, DELMA BANKS, JR., that caused the death of Richard Wayne Whitehead was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, DELMA BANKS, JR., would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Do you find from the evidence beyond a reasonable doubt that if raised by the evidence, the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:27 P.35

evidence was "double-edged," and could have easily led jurors to conclude that Banks' social and psychological history put him at an increased risk for future criminal behavior and violence. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). Certainly, the evidence would have provided ample ammunition for the prosecution to argue that Banks was unlikely to alter his violent conduct. Of course, this argument would have only been bolstered by referencing the brutal and senseless murder of Richard Whitehead and the fact that Banks later attempted to retrieve the murder weapon so that it could be used in future armed robberies. Additionally, the omitted evidence would have had little mitigating value in the context of Banks' trial. For instance, there is no significant difference between the "social history" developed during state habeas proceedings and the character evidence presented during the punishment phase of trial. What little additional information was produced regarding the tree-tying incident, Banks' skin condition, and his father's reported alcohol abuse, if relevant at all, "would barely have altered the sentencing profile presented to the [jury]." *Strickland*, 466 U.S. at 700. Such evidence simply would not have proved effective in mitigating Banks' moral culpability for Whitehead's death. Finally, in Banks' testimony during sentencing proceedings, he continued to adamantly deny any role in the offense, rendering the additional "mitigating" evidence virtually irrelevant. The Court of Appeals was therefore correct to conclude that the evidence presented during habeas proceedings did not create a reasonable probability of a different sentencing verdict.

Banks' attack on the Fifth Circuit's decision is without merit. Certainly, Banks is correct to assert that a federal court must view the evidence as a whole when evaluating prejudice under *Strickland*. *See* (*Terry*) *Williams*, 529 U.S. at 397-98. However, there is

Tr 102-03. The jury answered each of these issues in the affirmative, *id.*, resulting in an automatic death sentence under Texas law.

TX OFC ATTY GEN Fax:320813 Mar 3 2003 10:27 P.36

nothing in the Fifth Circuit's opinion to show that the court did not follow this rule. For instance, the Court of Appeals cited the proper standard for gauging prejudice, *see* Appendix A at 34, and specifically observed that the evidence related to Banks' social and psychological histories was "related." *Id.* at 36. Although it is true that the lower court's opinion divides its discussion of this evidence into categories, this organizational device was simply meant to facilitate the court's analysis of whether Dr. Cunningham's testimony was adequately exhausted. *Id.* at 36-40. The court's opinion simply does not indicate that the court neglected to consider the totality of the mitigating evidence when it rendered its decision. Moreover, even if the court had considered the testimony of Banks' parents separately from Dr. Pina's affidavit, that testimony added nothing to the psychological evidence. Dr. Pina's affidavit specifically accounted for the allegations of abuse, paternal alcoholism, and Banks' skin condition, and the court discussed each of these factors in turn. The Fifth Circuit therefore did not fail to consider this evidence as a whole.

Additionally, contrary to Banks' assertions, the circumstances of Banks' case are entirely dissimilar to those presented to this Court in *Williams*. For instance, unlike the Virginia state court in that case, the Fifth Circuit applied the proper standard for evaluating prejudice under *Strickland*. *See* (*Terry*) *Williams*, 529 U.S. at 391-95. Also, the evidence presented by Banks is a far cry from the quantity and character of mitigating evidence presented in *Williams*. Despite Banks' allusions to the contrary, the evidence he presented during his habeas proceedings did not show the kind of "extensive records graphically describing [a] nightmarish childhood" that the *Williams* Court considered. *See id.* at 395 & n.19. In fact, as discussed above, Banks is only able to cite one incident of physical violence at the hands of his father, vague references to paternal alcoholism, and evidence that he suffered from childhood eczema. Similarly, Banks' allegations that he suffers from a low-

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:28 P.37

average IQ, mild neurological impairment, and low self-esteem do not undermine confidence in his death sentence. In short, Banks fails to show any similarity to *Williams* and does not demonstrate any compelling reason for this Court to grant certiorari review.

IV. Certiorari Review Is Unwarranted On Banks' Claim That The Fifth Circuit Erred When It Concluded That The District Court Did Not Abuse Its Discretion By Declining To Consider A *Brady* Claim That Had Not Been Alleged In Banks' Federal Habeas Petition.

Banks next complains that the Court of Appeals erred when it declined to grant a COA to review the district court's decision refusing to consider a *Brady* claim alleged for the first time in Banks' proposed findings of fact and conclusions of law. *See* Petition at 33-36. For the purposes of his certiorari petition, Banks does not dispute that this *Brady* issue – which involved the alleged suppression of a transcript from a September 1980 interview with State's witness Charles Cook – was not raised in his federal petition for writ of habeas corpus or in any formal pleading intended to supplement or amend that petition.[19] However, he argues that the issue was "tried" by implied consent during the federal evidentiary hearing held in his case, and that the claim was therefore properly before the district court pursuant to Federal Rule of Civil Procedure 15(b). *Id.* He therefore urges this Court to grant certiorari review and hold explicitly that Rule 15(b) applies to evidentiary hearings that are held in conjunction with federal habeas corpus proceedings. *Id.* at 36.

---

[19] Banks' federal habeas petition did raise a *Brady* claim alleging that the prosecution failed to disclose certain evidence that would have revealed a relationship between Cook and Farr, as well as evidence that would have revealed that Cook testified at Banks' trial pursuant to a "deal" to dismiss certain criminal charges that were pending against him in Dallas County. 1 R 46-47 at ¶ 152-53. In parts of his certiorari petition, Banks appears to suggest that any argument about the transcript – which did not touch on either of these previously raised issues – was subsumed within these claims. *See* Petition at 19-21. However, Banks does not offer any substantive argument on this basis, and instead simply concentrates on the Court of Appeals' refusal to apply Federal Rule of Civil Procedure 15(b). *Id.* at 33-36.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:28 P.38

This Court should decline to grant review in this case because the lower federal courts correctly concluded that Banks' *Brady* claim was not properly presented to the district court. Specifically, the record reveals that Banks did not raise any *Brady* allegations related to the non-disclosure of the Cook interview in his federal habeas petition. As both the Fifth Circuit and the district court observed, this failure could be fairly attributed to Banks' contention that he did not become aware of the transcript until it was provided to his attorneys during the discovery ordered by the federal magistrate judge. *See* 5 SR 1264; Appendix A at 52. However, even when Banks became aware of the interview, he did not seek to supplement or amend his federal writ petition to allege the transcript as a basis for habeas relief. Instead, he waited to allege a formal *Brady* claim based on the transcript for the first time in his proposed findings of fact and conclusions of law, 4 R 920-21, 930-31, and again in his objections to the magistrate's report and recommendation. 5 R 1183-86. When the district court did not address the claim in its order adopting the magistrate's recommendation, Banks filed a motion to alter or amend the judgment. *See* 5 R 1211-12. The district court denied this motion and refused to consider the merits of the claim, holding that "[i]ssues first argued by way of objections to a Magistrate Judge's findings and conclusions are not considered to be properly before the district court." 5 R 1265 (citing *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)).

In the Fifth Circuit, Banks argued for the first time that the district court's decisi refusing to consider his *Brady* claim ran afoul of Federal Rule of Civil Procedure 15(b). Brief for Petitioner-Appellee at 75, *Banks v. Cockrell*, No. 01-40058 (5th Cir. filed Jul 2001). He suggested – as he does in this Court – that the Director implicitly consen have the claim litigated when she did not raise a specific objection to the admissior transcript, or to questions about the transcript, during the federal evidentiary hear

BEST AVAILABLE COPY

The Court of Appeals rejected this argument. Reviewing the district court's order for an abuse of discretion, the panel found that the district court correctly concluded that "Banks should have sought leave to amend his petition to add this claim." Appendix A at 52. It also affirmed the district court's conclusion that "issues first raised in objections to a report and recommendation are not properly before the district court." *Id.* (citing *Armstrong*, 951 F.2d at 630). Finally, the Court of Appeals observed that Banks "has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." *Id.* It therefore declined to grant a COA on Banks' claim that the district court erred by denying his Rule 59(e) motion. *Id.*

In the instant certiorari petition, Banks again fails to demonstrate that the district court abused its discretion by declining to review his belated *Brady* claim. The statue governing habeas proceedings provides that applications for a writ of habeas corpus "may be amended or supplemented as provided by the rules of procedure applicable to civil actions." 28 U.S.C. § 2242 (West 1995); *see also* Rule 11, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (West 1995) ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules"). Thus, Rules 15(a) and (d) of the Federal Rules of Civil Procedure specify how a petitioner may go about either amending or supplementing a federal writ. However, it is clear that Banks did not seek to take advantage of either of these provisions at any time during the federal court litigation.

Instead, on appeal, Banks seeks the shelter of Rule 15(b), which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." However, as noted by the Court of Appeals, there is simply no authority applying this rule – which by its terms

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:29 P.40

is limited to a "trial" – to an evidentiary hearing held in conjunction with federal habeas proceedings.[20] Moreover, there are a number of reasons to refrain from applying the rule in the same manner as one might to a civil trial. For instance, the rules of evidence are frequently relaxed during such hearings, permitting a more liberal exploration of issues than might occur at a formal trial. Also, the absence of a formal pleading requirement in federal habeas proceedings would seriously impair the government's ability to assert valid procedural defenses that are unique to habeas law. For example, where a petitioner attempts to inject a new basis for relief at an evidentiary hearing without amending his complaint to specifically include the claim, the respondent would be handicapped in her ability to raise defenses such as exhaustion and procedural default. She would be reduced to parsing the record of the hearing and attempting to respond by speculating about how the petitioner intended to use the proffered evidence. Thus, the better rule in these circumstances is to require the petitioner to formally and timely designate the issues on which he seeks relief.

However, even if Rule 15(b) applied to federal habeas proceedings in general, the Court of Appeals correctly refused to utilize the rule in this case. Nothing about the record indicates that the Director consented – either implicitly or explicitly – to allowing Banks to amend his petition to include this *Brady* allegation. Indeed, she vigorously opposed allowing Banks to present any new, unexhausted evidence to the federal court, arguing that it was barred by *Keeney*, *supra*. The Director stated these objections in her written opposition to Banks' request for an evidentiary hearing, 2 R 560-82, in her objections to the court's order setting a hearing, 2 R 593-97, during the hearing itself, 6 R 9-10, in her post-hearing brief, 3 R 804-14, and in her objections to the magistrate's report and recommendation. 5 R 1146-48. Thus, Banks' suggestion that this issue was tried by "consent" is belied by the record. In the absence of the Director's consent to try the issue, Banks may not be freed from the requirement that he formally supplement or amend his habeas petition pursuant to Rules 15(a) or (d).

[20] As Banks concedes, this Court's opinions in *Harris v. Nelson*, 392 U.S. 286 (1969), and *Withrow v. Williams*, 509 U.S. 680 (1993), did not hold that Rule 15(b) applied to an evidentiary hearing in a federal habeas proceeding. It should also be noted that Banks did not cite either case in his briefing before the lower federal courts.

TX OFC ATTY GEN Fax:3208132 Mar. 3 2003 10:29 P.41

V. Certiorari Review Is Unwarranted On Banks' *Swain* Claim Because The Fifth Circuit Correctly Found The Claim To Be Procedurally Defaulted.

Finally, Banks maintains that Bowie County prosecutors used peremptory challenges to systematically exclude black citizens from all criminal juries in the county over the preceding five years. Petition at 38-40. This practice, he contends, violates the Equal Protection Clause pursuant to *Swain v. Alabama*, 380 U.S. 202 (1965).[21] The Fifth Circuit, like the district court, found the claim to be procedurally barred on federal habeas review and thus denied a COA. *See* Appendix A at 63-74. As the court explained, Banks failed to comply with Texas' contemporaneous objection rule in the trial court, and the state court explicitly relied on this firmly established state procedural bar to dispose of the claim. *Id.* Moreover, the court held, even if Banks demonstrated cause for the default arising from trial counsel's failure to object on *Swain* grounds, he could not establish prejudice to overcome the procedural bar. *Id.* at 74. Banks now asks this Court for review, arguing that the Fifth Circuit's procedural default analysis was erroneous. Because it was not, he fails to present this Court with a compelling reason to review this issue.

Where the last state court judgment relies upon a state procedural bar, that judgment

[21] *Swain* was overruled in part by *Batson v. Kentucky*, 476 U.S. 79 (1986). Because his trial took place before *Batson* was decided, and because he presents his claim on collateral review, Banks cannot take advantage of *Batson*. *See Allen v. Hardy*, 478 U.S. 255, 258 (1986).

TX OFC ATTY GEN Fax:3208132 Mar. 3 2003 10:30 P.42

rests on a state law ground that is independent of the federal question and adequate to support the judgment, thus precluding federal habeas relief.[22] *See Lee v. Kemna*, 534 U.S. 362, 336 (2002); *Coleman*, 501 U.S. at 729-30; *Harris v. Reed*, 489 U.S. 255, 264 (1989). Federal courts must honor the application of an adequate and independent state procedural bar even if the state court reaches the merits of the claim in the alternative. *Harris*, 489 U.S. at 264 n.10. To apply this rule of procedural default to a federal habeas petitioner, the state court's procedural rule must be firmly established and followed regularly by the state courts on similar claims. *See Lee*, 534 U.S. at 336; *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). The state court decision must also clearly and expressly rely upon the rule. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Once the clarity and regularity of the state procedural rule are established, a petitioner can overcome the bar to federal relief only by showing cause and prejudice for the default, or that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

A. The Texas contemporaneous objection rule is firmly established and applied regularly to similar claims.

Here, it is undisputed that Banks failed to object on equal protection grounds to the racial composition of the jury venire. Banks' certiorari petition also does not dispute that the State raised Banks' failure to object as a ground for disposing of the claim in both the stat and federal courts. Rather, Banks asserts that Texas did not consistently apply i

---

[22] Although Banks raised this claim in his first state writ proceeding, in which the s court disposed of it on the merits, the cases indicate that the *last* state court judgment is contro in determining whether a procedural bar applies. *See Ylst v. Nunnemaker*, 501 U.S.797, 801 (1 Here, the last state court judgment on this issue came on Banks' third state writ, in which the applied a state procedural bar for failure to object. 2d Supp. SHTr 28 at ¶ 16.

contemporaneous objection rule to *Swain* claims at the time of his trial. Petition at 36-38.

This Court has recognized that a defendant may forfeit a *Swain* claim if the defendant fails to properly raise or preserve his complaint in the trial court. *See, e.g., Teague v. Lane*, 489 U.S. 288, 297 (1989) (holding that petitioner procedurally defaulted his *Swain* claim on federal habeas because he did not object or otherwise raise the issue at trial or on direct appeal). To properly preserve an equal protection objection to race-based peremptory challenges under *Swain*, a defendant must at least bring the claim to the trial court's attention by way of an objection or motion referencing the Fourteenth Amendment or *Swain* itself, or referring to a historical practice of racial bias in the exercise of peremptories. *Trevino v. Texas*, 503 U.S. 562, 566-67 (1992); *Ford v. Georgia*, 498 U.S. 411, 420-21 (1991). Thus, though the equal protection objection need not be artful, a complete failure to challenge *in any form* the state's exclusion of black jurors through the use of peremptory challenges implicates a state's contemporaneous objection or preservation requirements. Importantly, many federal courts have applied a state's contemporaneous objection rule to claims substantially similar to the *Swain* claim asserted here, and have recognized that *Swain* provided defendants with the means to raise a *Batson*-type claim prior to *Batson's* date of decision.[23] *See, e.g., McCrory v. Henderson*, 82 F.3d 1243, 1250 & n.7 (2d Cir. 1996)

---

[23] Banks' attempt to distinguish *Batson*-type objections from *Swain*-type objections is unavailing for procedural default purposes. Failure to follow a state procedural rule that is regularly applied to *similar* claims precludes federal habeas relief. *See Hathorn*, 457 U.S. at 263. It cannot be seriously disputed that *Batson* claims are substantially similar to *Swain* claims. *See Ford*, 498 U.S. at 420 ("*Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim"). Moreover, attorneys in other *Swain*-era cases have made strategic decisions to lodge objections in some form at trial to the State's historical exclusion of black venire members. *See id; Trevino*, 503 U.S. at 567. Banks offers no reason why counsel could not have done so in his case.

TX DEC ATTY GEN Fax:3208132 Mar 3 2003 10:31 P.44

(holding that petitioner was procedurally barred for failure to object to prosecution's use of race in peremptory challenges, even though *Swain*, not *Batson*, was law at the time of trial); *Jones v. Butler*, 864 F.2d 348, 364 (5th Cir. 1988) (holding that petitioner who was tried before *Batson* could have objected to race-based peremptories under *Swain*, and failure to do so cannot be excused); *Teague v. Lane*, 820 F.2d 832, 834 n.6 (7th Cir. 1987) (holding that petitioner was procedurally barred from raising *Swain* violation where he failed to raise *Swain* claim in state court); *Wright v. Hopper*, 169 F.3d 695, 709 (11th Cir. 1999) (holding that *Swain* claims can be procedurally defaulted for failure to object).

As the Fifth Circuit has repeatedly recognized, the Texas contemporaneous objection rule is firmly established and regularly followed, and failure to comply with it is a sufficient basis for denying federal habeas relief. *See, e.g., Hogue v. Johnson*, 131 F.3d 466, 487 (5th Cir. 1997). Texas courts apply the rule to constitutional claims generally, *see, e.g., Ex Parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974); more specifically, to claims regarding the selection of the jury; and, even more specifically, to a prosecutor's race-based peremptory challenges in the pre-*Batson* era.

For example, in *Lopez v. State*, 437 S.W.2d 268, 269 (Tex. Crim. App. 1968), the Texas Court of Criminal Appeals explained that, where the defendant failed to object at the time of trial to the manner of jury selection, he was "not entitled to complain, for the first time in his motion for a new trial, of the manner in which the jury panel was selected." Similarly, in *Singleton v. State*, 346 S.W.2d 328, 330 (Tex. Crim. App. 1961), the court found that the defendant, who believed the method of jury selection in his case was influenced by the race of potential jurors, did not object to irregularities in selection of the venire, "*as is required by the holdings of this Court.*" (emphasis added). Indeed, as early as 1976, the Fifth Circuit also recognized that Texas procedural law required a timely objection

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:31 P.45

to the racial composition of both the petit jury array and the actual petit jury; thus, failure to object barred such a claim on federal habeas review. *Cunningham v. Estelle*, 536 F.2d 82, 83-84 (5th Cir. 1976).

More specific developments followed. In *Chambers v. State*, the Court of Criminal Appeals broadly stated that "failure to object to the constitutionally improper exclusion of veniremen waives that right and such exclusion cannot be considered on appeal," absent a showing that the claim is new or novel. 568 S.W.2d 313, 319 (Tex. Crim. App. 1978), *overruled on other grounds by Grijalva v. State*, 614 S.W.2d 420 (Tex. Crim. App. 1980). It was unclear in *Chambers* whether the court was applying its statement to *Swain* claims specifically.[24] However, the court clarified its view in *Williams v. State*, which held that failure to object to the improper exclusion of black venire members waived error on appeal, where the defendant was tried in the *Swain* era, *before Batson* was decided. 773 S.W.2d 525, 534-35 (Tex. Crim. App. 1988). Even though *Batson* altered *Swain's* evidentiary burden, the court held, *Swain's* recognition of a potential equal protection challenge defeated the argument that such objections were novel and not previously available; thus, failure to object to the State's peremptory challenges could not be excused on this basis. *Id.* Also, in *Mathews v. State*, where the defendant's trial also took place in the *Swain*/pre-*Batson* era, the court recognized, "[t]hat purposeful discrimination by the State through use of peremptories

---

[24] *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), upon which Banks relies, Petition at 37, does not save Banks' claim. *Haliburton* merely stated in a footnote that "we cannot say prior to applicant's evidentiary hearing that he needed to object at trial in order to preserve error." *Id.* at 135 n. 5. This equivocal statement hardly serves to prove Banks' claim that the contemporaneous objection rule does not apply. Moreover, as the Fifth Circuit has recognized, "an occasional act of grace by the Texas court in entertaining the merits of a claim that might have been viewed as waived by procedural default" does not constitute a failure to regularly follow the state's contemporaneous objection rule. *Hogue*, 131 F.3d at 487.

TX OFC ATTY GEN Fax:3208132 Mar 3 2003 10:32 P.46

BEST AVAILABLE COPY

o strike Blacks from the jury venire violates the Fourteenth Amendment has already been set forth in *Swain v. Alabama*." 768 S.W.2d 731, 733 (Tex. Crim. App. 1989). Any such claim was not "so novel that appellant's failure to object may be excused." *Id.*; *cf. Reed v. Ross*, 468 U.S. 1, 16 (1984) (holding that failure to raise a claim in accordance with state procedures will be cause to avoid a procedural bar on federal habeas review where the "constitutional claim is so novel that its legal basis was not reasonably available to counsel"); *Byrd v. Armontrout*, 880 F.2d 1, 7 n.6 (8th Cir. 1989) (finding that petitioner's *Swain* claim was not "novel" under *Reed* because "the legal framework for a discrimination claim under *Swain* had been in place for over twenty years at the time Byrd was pursuing state post-conviction relief").

The cases thus evince a rule of law that can be demonstrated with a simple syllogism: (1) claims regarding the race-based exclusion of black venire members are subject to Texas' firmly established contemporaneous objection rule; (2) *Swain* claims are claims regarding the race-based exclusion of black venire members; (3) therefore, *Swain* claims are subject to the contemporaneous objection rule. Because Banks failed to object, and because the last state court judgment explicitly relied on Banks' failure to object in disposing of the *Swain* claim, the Fifth Circuit correctly found the claim to be procedurally barred on federal habeas.

B. Banks failed to demonstrate cause and prejudice.

Banks also argues that the Fifth Circuit erroneously concluded that, although counsel's failure to raise the *Swain* claim *may* have constituted cause for the procedural default, Banks did not establish prejudice. Petition at 38. The Fifth Circuit explained that trial counsel, a former district attorney, "had an erroneous view of the *Swain* burden of proof." *Banks*, slip op. at 72. The court then noted the Director's argument that "determined that a *Swain* objection would be frivolous and unsuccessful